

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-5001

UNITED STATES COURT OF APPEALS
For the Second Circuit.

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P

In re

W. T. GRANT COMPANY,

Bankrupt,

LIEBMAN, EULAU, ROBINSON & PERLMAN
ESQS.,

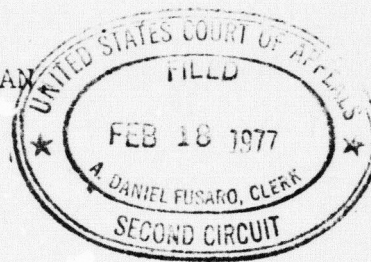
Appellant,

-against-

CHARLES G. RODMAN, as Trustee of the
Estate of W. T. Grant Company,
Bankrupt,

Appellee.

On Appeal from the United States District Court
for the Southern District of New York.



BRIEF FOR APPELLANT

Liebman, Eulau, Robinson & Perlman
Appellant Pro Se
32 East 57th Street
New York, New York 10022
(212) 355-5522

Of Counsel:

Herbert Robinson
Allan J. Kirschner
Ted M. Rosen

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ISSUES PRESENTED

1. Where the memorandum opinion and order dated May 13, 1976 (Galgay, J.)

(A) erroneously presumed that there was substantial duplication of services, which issue was raised by neither the Court nor any party represented below;

(B) failed to take into account the retaining and charging liens which Liebman, Eulau, Robinson & Perlman possesses; and

(C) was contrary to the Bankruptcy Court's ruling at the hearing that the application would be allowed, which ruling was in accordance with the views of all the parties represented at that hearing;

did the Bankruptcy Judge err by directing that W. T. Grant Company, the debtor, pay appellant only \$25,000 plus disbursements of \$1,621.70, instead of a total of \$37,361.25 and did the District Court (Duffy, J.) err by dismissing appellant's appeal from the aforesaid order of the Bankruptcy Court?

Answer: Appellant submits the answer is yes.

STATEMENT OF FACTS

On October 2, 1975, W. T. Grant Company ("Grant")* filed with the Bankruptcy Court for the Southern District of New York a petition under Section 322 of Chapter XI of the Bankruptcy Act and Rule 11-6 of the Chapter XI Rules (A.13).** Prior to Grant's filing on October 2, 1975, Liebman, Eulau Robinson & Perlman ("Appellant"), was engaged by Grant to represent it in an action entitled "W.T. Grant Company v. John A. Christensen, et al", 75 Civ. 471 (CLB), as well as in a related action instituted by Grant against the Christensens in the United States District Court for the Southern District of Connecticut (both actions are hereafter referred to as "the action") and a claim against Grant's fidelity bonding company (the "bonding claim") and has been so representing Grant since January, 1975 (A. 14). Grant agreed to pay for Appellant's legal services at Appellant's prevailing hourly rates (A. 20)

*Grant was a publicly held corporation organized under the laws of the State of Delaware, the shares of which were traded on the New York Stock Exchange. Immediately prior to the filing of its Chapter XI petition, Grant was engaged in the business of operating and managing retail outlets for the sale of general lines of merchandise. At such time, Grant operated a total of 1,070 stores (533 under the name "Grant City" and 537 under the name "Grant's"). Said stores were located in 40 states and occupied a gross area of approximately 52,000,000 square feet. During its fiscal year ending January 30, 1975, Grant had sales of One Billion Seven Hundred Sixty-One Million Nine Hundred Fifty Two Thousand (\$1,761,952,000) Dollars, making it the sixth largest retail business in the United States, exclusive of supermarket chains, and the seventeenth largest retail business overall. Prior to the filing of its Chapter XI petition, Grant had 62,000 employees (A.13).

** "A" unless otherwise indicated refers to page number in the Joint Appendix.

By order of Hon. John J. Galgay, Bankruptcy Judge, dated November 14, 1975, Liebman, Eulau, Robinson & Perlman was retained as Special Counsel to Grant in the aforesaid action and bonding claim (A.11-12).

This is an appeal from the order of Bankruptcy Court (Galgay, J.) dated and filed May 13, 1976 (A.78-9), and the orders of the District Court (Duffy, J.) dated October 12, 1976 and November 29, 1976 (A.94-5) which respectively dismissed appellant's appeal from the aforesaid Bankruptcy Court order and upheld that dismissal upon reargument. The Bankruptcy Court's order of May 13, 1976 denied appellant's application for an order permitting it to transfer to itself the sum of \$37,361.25 out of the sum of \$75,000.00, which fund appellant had collected as a part of a settlement effected by appellant for Grant and which was being held in appellant's special account. The \$37,361.25 requested was for fees for legal services performed (\$35,739.55) and unpaid disbursements (\$1,621.70) expended by appellant from February 14, 1975 through and including October 1, 1975 (prior to the filing of the bankruptcy proceeding) in the action and the bonding claim (A.25). The Bankruptcy Court thus slashed appellant's fees by approximately 30% despite being "impressed with the results of the services rendered by [appellant] insofar as W.T. Grant has received the combined benefit of \$230,000.00 from a settlement agreement and negotiations with a shopping center developer." (A.78).

The Court assumed a duplication of services by Appellant although, as discussed infra, that question was neither discussed by any party nor was it supported by any portion of the record.

Appellant's application for the fees requested was supported by the detailed factual affidavit of Allan J. Kirschner, Esq. a member of Appellant's firm (A.24-35). (That affidavit is hereafter referred to as the "Kirschner affidavit"). A hearing on the application was held before Bankruptcy Judge Galgay on April 2, 1976.*

Appellant has represented Grant in the Southern District of New York and Connecticut actions since their inceptions early in 1975 (A.19).** The litigation in the Southern District of New York was commenced on January 31, 1975 and seeks damages against several former high-level fiduciaries employed in Grant's real estate department, who were charged with the responsibility of negotiating leases, selecting sites and recommending the lease price for Grant's stores to be located in shopping centers in various parts of the country. Also named as defendants were a group of real estate developers which allegedly paid bribes and kickbacks to Grant's real estate directors in order to obtain Grant's business.

* The transcript of the April 2, 1976 hearing appears at A.37-86.

** By order of the Bankruptcy Court dated June 28, 1976, Appellant was authorized to represent the Trustee in the action and bonding claims (A.82-3). By order dated July 2, 1976 the Trustee was substituted for Grant as party plaintiff in the action in the Southern District of New York

A number of defendants moved to dismiss Grant's claims. The litigation is now proceeding toward trial and involves claims relating to fraud, breach of fiduciary duty, commercial bribery and breach of and interference with contracts (A.18).*

Appellant has also been representing Grant in a claim under its fidelity bond against Home Insurance Company, the carrier, for losses resulting from the dishonesty of its real estate executives, acting alone and in collusion with each other, as well as with shopping center developers (A. 21). Appellant compiled and presented to the Home Insurance Company a proof of loss in the amount of \$2,204,563.49 (A. 21) and reserved the right to file amended proofs of loss if necessary (A. 21). The attorneys for Home Insurance Company requested additional information in support of such claim and Appellant compiled relevant data to further support and supplement the claim. In the opinion of Appellant, Grant has a valid and meritorious claim** (A. 21).

Appellant also conducted settlement negotiations and entered into an agreement of settlement with the Christensen

*One of the defendants had moved to dismiss the complaint or alternatively to disqualify Appellant. Judge Brieant denied that motion. His decision denying said motion was affirmed on appeal by this Court in March 1976.

** Subsequent to the decision of the Bankruptcy Court, Appellant filed an amended proof of claim in the amount of \$820,622.72, and, on behalf of the Trustee, commenced litigation against Home Insurance Company for damages in the sum of \$3,000,000.00 in the Supreme Court, State of New York (Index No. 1257/77).

defendants in the New York and Connecticut actions (A.25). As part of that settlement, which was negotiated and entered into prior to Grant's filing its Chapter XI petition, Grant received \$150,000.00, \$75,000.00 of which was paid to Grant on or about May 16, 1975 at the time that the settlement agreement was executed; the additional \$75,000.00 was paid to Grant and Appellant as attorneys for Grant. The latter amount was paid by a check which was endorsed by Grant and Appellant and deposited into the special account maintained by Appellant (A. 26). The payment was secured by notes and an executed offer of judgment which at all times remained in Appellant's possession. As a result of Appellant's representation, Grant has also retained in excess of \$80,000.00 from a shopping center landlord who made secret payments to Christensen (A. 26).

The Kirschner affidavit set forth in detail the services rendered by Appellant in connection with its representation of Grant from February 14, 1975 through and including October 1, 1975. That affidavit also set forth a detailed breakdown of the hours spent by the partners, associates and paralegals of Appellant's firm in connection with those services (A.33).

* The time records of the attorneys and paraprofessional of Appellant were maintained in the regular course of Appellant's business and were available for inspection by the Court below although neither the Court nor any party requested to inspect them.

The amount of \$37,361.25 requested by Appellant in that application was for fees for unpaid legal services performed by Appellant from February 15, 1975 through and including October 1, 1975 (the date prior to the filing of the bankruptcy proceeding) in the action and bonding claims in the sum of \$35,739.55 plus unpaid disbursements in the sum of \$1,621.70. The total amount of services rendered by Appellant during that period amounted to \$60,739.55 for which Appellant received partial payment of \$25,000.00 (A.25). Appellant has not received any other payment for those services rendered or moneys disbursed on behalf of Grant.

The Hearing Below

At the April 2, 1976 hearing on Appellant's application before Judge Galgay, Appellant proposed that, in view of certain objections that had been raised by counsel for the debtor as to the legal validity and applicability of the attorney's liens claimed by Appellant, the \$25,000.00 which Appellant had already received in payment of its fees be applied to the work, labor and services rendered by Appellant during the period between May 16, 1975 and October 1, 1975 (the day prior to the filing of the Chapter XI petition) (A.41). Under that theory, Appellant's attorney's charging lien, which counsel for the debtor had conceded applied to services rendered prior to

May 16, 1976 (A. 47), could be the basis for recovery of the amount sought by Appellant's application. Both counsel for the debtor and counsel for the official creditors' committee did not object to having that \$25,000.00 applied to services rendered from May 16, 1975 through October 1, 1975 (A.47-9). No other party appeared at such hearing or opposed the application although notice of the hearing had been given to them (A.39,58).

At the hearing, neither the Court nor any other party raised any issue as to the nature and extent of the services rendered by Appellant (A.37-56). There was no question raised as to duplication of services and Appellant was not called upon to submit any additional records of time expended and disbursements and expenses incurred in rendition of the professional services it performed in connection with these matters. Id. In the ordinary course of its business, Appellant maintained records of the services it rendered and the expenses it incurred. Those records, which were and are available for inspection by the Court, establish that duplication, if any, was minimal and that Appellant spent the hours set forth in the application below in connection with its rendition of professional services to Grant.

At the conclusion of the April 2, 1976 hearing, the attorneys for the debtor and the official creditor's committee did not object to awarding Appellant the fees claimed as

a setoff pursuant to the theory advanced by Appellant,* and the court granted Appellant's application (A.56). The court stated:

"I will allow the application and I will also insist that Liebman, Eulau, Robinson and Perlman submit an order containing proposed findings of fact and conclusions of law embodying Mr. Gewertz' approach with respect to the \$25,000 and at least put into appropriate form what has been discussed in the record and my own observations particularly with respect to the \$75,000 being received after the petition was filed. And I view that as more or less a continuing type of service." (A. 56).

In compliance with Judge Galgay's directive, Appellant prepared and filed elaborate findings of fact, the time for which was totally noncompensable (A.57-75). Those proposed findings in the main were based on the findings of the Bankruptcy Court upon the earlier application for payment of interim allowance to the law firm of Wachtel, Lipton, Rosen & Katz, attorneys for the debtor. Notwithstanding the aforesaid ruling, the Bankruptcy Court in its memorandum decision dated May 13, 1976, although noting that it was "impressed with the results of the services rendered by" Appellant insofar as Grant "has received the combined benefit of \$230,000 from a settlement agreement and by negotiations with a shopping center developer", denied Appellant's application and awarded only

*As discussed supra, that theory was that the \$25,000 already received by Appellant be applied to services rendered by Appellant during the period May 16, 1975 to October 2, 1975 and that therefore the \$37,361.25 out of the \$75,000 which was now being held in Appellant's special account be applied for services and disbursements incurred on behalf of Grant for the period commencing February 14, 1975 through and including May 16, 1975.

\$25,000.00 plus \$1,621.70 as disbursements, or a total of \$26,621.70, instead of the \$37,361.25 sought by the application (A.78-9). The findings of fact and conclusions of law prepared by Appellant were not signed by the Court.

POINT I

WHERE THE BANKRUPTCY COURT'S MEMORANDUM OPINION AND ORDER DATED MAY 13, 1976 (Galgay, J.) ERRONEOUSLY PRESUMED THAT THERE WAS SUBSTANTIAL DUPLICATION OF SERVICES, FAILED TO TAKE INTO ACCOUNT APPELLANT'S RETAINING AND CHARGING LIENS, AND WAS CONTRARY TO THE RULING OF THE BANKRUPTCY COURT AT THE APRIL 2, 1976 HEARING, WHICH GRANTED THE APPLICATION. THE BANKRUPTCY COURT ERRED BY DIRECTING THAT W. T. GRANT, THE DEBTOR, PAY APPELLANT ONLY \$25,000 PLUS DISBURSEMENTS OF \$1,621.70 INSTEAD OF \$37,361.25, AND THE DISTRICT COURT (DUFFY, J.) ERRED BY DISMISSING APPELLANT'S APPEAL FROM THE AFORESAID ORDER OF THE BANKRUPTCY COURT.

The May 13, 1976 Memorandum Decision Erroneously Presumed That There Was Duplication of Services By Appellant, Which Issue Was Not Raised By Either the Court or Any Party Represented Below.

The May 13, 1976 memorandum decision erroneously presumed that there had been duplication of services by Appellant.

"It is unusual under the circumstances that the services of six associates, a paralegal, and one outside counsel could be efficiently used without some danger of duplication of services, particularly in light of the substantial time contributed by two partners of the firm." (A.78-9).

However, there is nothing in the record to support the conclusion that there was any duplication of services, or

that Appellant had not rendered its services efficiently.* In fact, as set forth in the May 19, 1976 letter of Herbert Robinson to Judge Galgay (A.80-1), any overlapping in the rendition of services was at most minimal:

"Your Honor may also be under a misapprehension as to the nature and extent of the services rendered. Unfortunately, since no one raised the issue, it was not discussed at the April 2, 1976 hearing. During the early stages of this matter, more than eight attorneys rendered independent services. Each separate attorney was gathering and compiling information concerning a particular defendant or potential defendant. At that time we were all working under urgent time pressures.

Subsequently I was primarily engaged in legal research, further fact gathering and negotiations with some of the defendants, as well as in the preparation of responsive papers to motions directed against the complaint, etc. Another partner and a number of associates were conducting legal research, drafting affidavits and briefs, etc. Any overlapping was minimal indeed. The hours of service relied upon were all reasonable and necessary and should have been credited in full, without the "discount" that was apparently applied because of Your Honor's assumption of substantial overlapping.

Inasmuch as a very large percentage of the services were performed by myself and my partner, Allan J. Kirschner, during a period when my standard time charge for such matters was \$150.00 per hour and Mr. Kirschner's was

*Confirmation of Appellant as special counsel to the trustee to continue representing the estate as to those matters on which Appellant had represented Grant symbolizes the trust and confidence reposed in Appellant by the Trustee. Indeed in his application for an order authorizing retention of Liebman, Eulau, Robinson & Perlman, filed on June 22, 1976 (subsequent to the order below which is the subject of this appeal), the Trustee stated: "By the continued retention of Liebman, Eulau the necessary legal services can be rendered at the least possible cost and with the greatest efficiency." (A.86).

\$100.00 per hour, it is readily apparent that we have been dealt a severe blow by this very sharp reduction in allowance."

The issue of duplication of services had not been raised by any party below. Indeed that issue had not even been raised by the Bankruptcy Court at the April 2, 1976 hearing. The Bankruptcy Court simply and incorrectly assumed a duplication of services by counting the total number of hours expended by the individual attorneys in Appellant's firm without knowing what each attorney did. Such a finding by the Bankruptcy Court should be reversed.

"When there is neither pleading nor proof respecting an issue, a finding by the referee will be disregarded and the case will be remanded, reversed or modified." 2A Colliers on Bankruptcy §39.28 (1974).

Even if the Bankruptcy Court had been faced with a claim of duplication, it should have inquired into what was done by the various attorneys. See In re Lustron Corp., 196 F.2d 975, 980 (7th Cir. 1952). The Court failed to afford appellant an opportunity to establish the absence of any duplication, and

Appellant did not attempt to do so because such a claim was not made below.

To determine whether the Bankruptcy Court's findings are clearly erroneous, the reviewing Court must examine the evidence. In re Howat, 278 F.2d 582 (7th Cir. 1960). Here an examination of the record shows that there is no evidence or claim supporting the finding of duplication of services. Accordingly, the order below should be reversed. There is no issue here of credibility of witnesses.* Cf. Simon v. Agar, 299 F. 2d 853 (2d Cir. 1962); Bankruptcy Rule 810.

In reversing the court below this Court should direct that Appellant's application be granted in full. This Court in previous cases has raised the amount of a fee awarded by the Bankruptcy Court. In re Hudson & Manhattan R.R. Company, 339 F.2d 114 (2d Cir. 1964), Silver v. Rosenberg, 139 F.2d 1020 (2d Cir. 1944).

Appellant respectfully submits that the court below erred in basing its decision on an assumption neither supported by the record nor, indeed, argued by any party. If the bankruptcy court had doubts as to the efficiency of the rendition

*Had the question of duplication of services been raised at the hearing below (which it was not) Appellant would have offered proof through witnesses and its actual time records establishing the absence of such duplication.

... of services by Appellant, or questions as to the rates charged
... by Appellant, Appellant respectfully submits that the court
should have raised these questions and allowed Appellant an
opportunity to respond to these matters and submit further
material in support of its application.

The Bankruptcy Court Failed To Take Into
Account Appellant's Retaining and Charging
Liens.

A. Appellant's Charging Liens

Since the funds in Appellant's special account represented the proceeds of the settlement entered into and negotiated by Appellant as counsel for Grant in the action, Appellant had a charging lien against the proceeds thereof. That charging lien arose pursuant to §475 of the Judiciary Law of the State of New York which provides in pertinent part:

"From the commencement of an action... in any court,... the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order of determination. The court upon the petition of the client or attorney may determine and enforce

the lien." N.Y. Judiciary Law §475
(McKinney's 1968)

Section 475 has been held to affect a substantial right and if the claimant comes within its provisions it will be enforced in the Federal courts. McChesney v. Sims, 267 F. 2d 215 (2d Cir. 1959); Markakis v. S.S. Mparrmpa Christos, 267 F.2d 926 (2d Cir. 1959); In re Baxter, 154 F.2d 22 (2d Cir. 1907); Nic. Projector Corp. v. Movie-Jector Co., 16 F. Supp. 605 (S.D.N.Y. 1935). The 2nd Circuit in Kamerman v. J.B.P. Holding Corp., 278 F.2d 411 (1960) stated:

"A lien under [§475 of the Judiciary Law of the State of New York] may be... enforced ... in the United States District Court. ... §475 is to 'be treated as one establishing a substantive right.'" Id at 413.

The charging lien created by §475 of the Judiciary Law is entirely distinct from the retaining lien which the attorney also has pursuant to the common law. Schwartz v. Schwartz, 25 Misc.2d 225, 205 N.Y.S.2d 34 (Sup.Ct. Nassau Co. 1960); Levine v. Levine, 206 Misc. 2d 884, 135 N.Y.S.2d 304 (Sup. Ct. Queens Co. 1954).

It has been held that the lien pursuant to §475 is determined by the sum the attorney is entitled to receive under his retainer or other agreement, express or implied. In re Regan, 167 N.Y. 338 (1901); Sea Isle Foods, Inc. v. State,

40 Misc. 2d 872, 244 N.Y.S.2d 613 (Ct. of Claims 1963) Here, prior to the bankruptcy, Grant had agreed to pay Special Counsel for its legal services rendered in accordance with its prevailing time charges in effect at the time such services were rendered. Those rates were set forth in detail in the application below. (A.20).

Under this section an attorney's statutory lien upon his client's cause of action can be enforced by appropriate order of the court which may direct that the lien be satisfied out of moneys or property to which the lien attaches though not in possession or control of the attorney. In re Cooper, 291 N.Y. 255 (1943); Bell v. Broadway Savings Bank, 129 N.Y.S. 2d 23 (Sup. Ct. Kings Co. 1954).

The charging lien attaches to the proceeds of the settlement.

"Although settlements may be freely made, and although Judiciary Law §475 merely provides that the attorney's charging lien 'can not be affected by any settlement between the parties before or after judgment' it is now firmly established that the statutory lien attaches to the sum or value agreed upon in the settlement, just as it would have attached to a judgment under the express provision of the statute, had a prosecution of the cause of action resulted therein.... " 1 Carmody Wait 2d Cyclopedia of N.Y. Practice §3:158 (1965)

As stated in one case by the Court of Appeals:

"The lien was not affected by the adjustment, but leaped from the extinguished cause of action to the amount agreed upon in settlement." Fischer-Hansen v. Brooklyn Heights R.R. Co., 173 N.Y. 492, 502 (1903)

Accord: Dolliver v. American Swan Boat Co., 32 Misc. 264, 65 N.Y.S. 978 (Sup. Ct. Kings Co. 1900).

Under New York law, the attorney's charging lien is confined to a lien for services in particular actions or special proceedings in which the lien is claimed, and binds awards or judgments obtained through the attorney's efforts. In re Dutcher Bros., 241 App. Div. 793, 268 N.Y.S. 149 (4th Dept. 1934); Manusse v. Mattia, 10 N.Y.S.2d 495 (Sup. Ct. Kings Co. 1939). Here it was not disputed below, and indeed cannot be disputed now, that through the services rendered Grant by Appellant in the action Grant obtained \$150,000 in settlement from the Christensens, \$75,000 of which is the fund from which the payment of the present claim is sought (in addition to the \$80,000 from the developer). Grant's counsel below argued that Appellant's charging lien only applied to Appellant's services rendered prior to May 16, 1975, the date of the execution of the Christensen settlement agreement, on the theory that a charging lien may apply only to fees for the services rendered which contributed to the creation of the property against which the lien is asserted. As will be seen, this theory is an incorrect application of the statutory lien. Moreover, even if the theory were valid, Appellant's application should have

been granted where the services rendered by Appellant in securing the \$75,000 payment for Grant were, and were found by the Bankruptcy Court, to constitute a "continuing type of service." (A. 56)

In support of their argument below that a charging lien may be used only to recover for those services rendered which contributed to the creation of the property against which the lien is asserted, the debtor's counsel cited only one 65-year old case, In re Jones, 76 Misc. 331, 136 N.Y.S. 819 (Sup. Ct. Nassau Co. 1912). That case simply is not applicable to the facts here. In Jones, the application under Judiciary Law §475 was brought by an attorney who was retained to prosecute an appeal from a final judgment in which appeal the client was claiming entitlement to additional lands beyond those awarded him in the final judgment. The final judgment had been obtained before the attorney seeking the lien had been retained. The appeal, which he perfected, failed. The court denied the application for a lien and held that:

"The court having decided against plaintiff's claim, there is nothing to which the lien could attach. There is no more reason why he should have a lien against property theretofore awarded by the judgment than against any other property of his client. The principal underlying an attorney's lien, statutory or at common law, is that his services have aided in creating the value to which the lien attaches." 136 N.Y.S. at 820.

Thus, Jones is distinguishable from the present case where it was Appellant, not other attorneys, whose services resulted in the \$75,000 fund.

The Jones court merely stated that the principle underlying an attorney's lien is that the attorney's services must have aided in creating the fund or benefit to which the lien attaches. The Jones court did not say that where an attorney's services have aided in creating the value to which the lien attaches, the lien could only attach to those services rendered which resulted in the creation of that value. It did not say that because that was not the case before it. Section 475 provides that the attorney who appears for a party has a lien upon his client's cause of action which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor. While a charging lien for services and disbursements in a particular action or proceeding cannot be asserted against the recovery in another action or proceeding, Leask v. Hoagland, 64 Misc. 156, 118 N.Y.S. 1035, aff'd 136 App. Div. 658, 121 N.Y.S. 197 (1st Dept. 1910), §475 does not restrict the charging lien to the value of services rendered in that action which led to that determination. The lien applies to all services rendered by the attorney in that action as opposed to services rendered in other actions. The debtor's counsel's argument below that the lien applies only to services rendered which contributed to the creation of the property against which the lien is asserted, seeks to restrict the statutory lien without foundation in the terms of the statute or applicable case law.

Moreover, even accepting, arguendo, the validity of the argument that the charging lien applies only to services rendered which contributed to the creation of the property against which the lien is asserted, the lien is properly applicable to the very services performed here. As the Bankruptcy Court found at the hearing, the services were "more or less a continuing type of service." (A.56). They were not limited to the period of time prior to the execution of the Christensen settlement agreement. In addition, the May 16, 1975 Christensen settlement stipulation required the performance of additional work after the date of the stipulation in connection with the collection of the settlement and in further conduct of the very same litigation (A. 43-4, 48, 54).

B. Appellant Was Also Entitled To Its Retaining Lien.

In addition to the charging lien discussed above, Appellant was entitled to a retaining lien upon such papers and proceeds as have come into its possession by virtue of its representation of Grant in this matter. This lien is wholly apart from the charging lien established by §475. Nolan v. Hemingway Bros. Interstate Trucking Co., 88 F. Supp. 111, 113 (S.D.N.Y. 1950).

As the New York Court of Appeals stated in Robinson v. Roger., 237 N.Y. 467, 470-472 (1924):

"In order to secure such payment the attorney has two kinds of liens - a general lien for the entire balance of account on all papers, securities or monies, belonging to his client which came into his possession and a charging lien for services rendered in a particular action or proceeding. A general or retaining lien is dependant upon possession; the charging lien was created to save the attorney's rights where he had been unable to get possession."

As early as 1871 the United States Supreme Court acknowledged the attorney's retaining lien as a unique means by which the attorney could secure the payment of his fees and disbursements through his retention of all the papers belonging to his client until the fees were paid. See Texas v. White, 77 U.S. 992 (1871); McPherson v. Cox, 96 U.S. 746 (1878). This Court, in In Re San Juan Gold, Inc., 96 F. 2d 60 (2d Cir. 1938), described the retaining lien in the following terms:

"An attorney has a lien for fees upon papers of his client which come into his possession in the course of his professional employment, and such lien is not invalidated by the bankruptcy of the client. ...[T]he right to retain the papers is valuable to the attorney in proportion as denial of access to them causes inconvenience to the client. Where the client or some one representing him has a pressing necessity for them, the court will order them delivered up on condition that the fee be paid or security given for such sum as may be found to be due. In the case at bar the trustee argues that the debtor has insufficient funds either to pay or to provide security for the appellant's fee. The record contains no evidence that the debtor is without funds, but however this may be, the fact is immaterial. Nor is it material that the debtor's reorganization proceedings may be thwarted, if access to the papers is denied. The

attorney's lien cannot be disregarded merely because the pressure it is supposed to exert becomes effective. ... If it is worth anyone's while to have the 77B proceedings continue and the papers are essential to that end, the necessary funds to obtain their release may be forthcoming; if not, the debtor and its trustee must do without them." Id. at 60-61.

Attorney's liens are as much property rights as are any other property liens, and are of no lesser importance than an artisan, mechanic, or any other creditor's lien. Accordingly, enforcement of attorney's liens is not discretionary; the attorney may not be compelled to turn over papers in his possession nor may the proceeds of any recovery be paid to his former client, without first fixing the attorney's fees and, then, only upon full payment of the fee.

Counsel for debtor below advanced the argument that the debtor's rights by virtue of Section 70 of the Bankruptcy Act were superior to that of Appellant's by virtue of its attorney's liens. This is not the law:

"An attorney's retaining or possessory lien on the papers of his client, or on the fruits of litigation, or on a chattel mortgage or on other property coming into his hands may be enforced notwithstanding bankruptcy. There are no requirements of notice or record surrounding this well-known common-law right; hence the trustee representing creditors is in no position to object. The amount of the lien is not measured by the value to the estate of the books or papers held by the attorney, but rather by the attorney's fee. [Citations omitted] [emphasis supplied]"

4A Collier's on Bankruptcy §70.87[2] (14th Ed.)*

Accord: Hartman v. Swiger, 215 F. 986 (N.D. West Va. 1914)

The May 13, 1976 Memorandum Decision and Order of the Bankruptcy Court Was Contrary to the Court's Ruling at the April 2, 1976 Hearing, in Which It Was Held That the Application Would Be Allowed and Which Ruling Was In Accordance With the Views of All the Parties Represented at That Hearing

At the hearing held in the Bankruptcy Court on April 2, 1976, Judge Galgay, stated:

"I will allow the application." (A.55-6).

Judge Galgay further directed Appellant to submit an order containing proposed findings of fact and conclusions of law embodying what was discussed at the hearing including Judge Galgay's "own observations particularly with respect to the \$75,000 being received after the petition was filed." (A.56).

None of the parties represented at the April 2, 1976 hearing raised any question about alleged duplication of services. Counsel for the debtor and the official creditors' committee voiced certain doubts as to the validity and applicability of the claimed attorney's liens. However, their limited objection to the application was resolved when all counsel and the court found acceptable the proposal that the \$25,000 previously received by Appellant should first be applied to the services which Appellant performed during May

*
Collier's also recognizes the validity of the attorney's charging lien as recognized by applicable state law and states that if valid and enforceable against every creditor with a provable claim against the client, the attorney's charging lien in such a state will withstand the trustee's attack under §70e. Collier's supra

16, 1975 through and including October 1, 1975 and the balance thereof should be applied to the services performed from February 14, 1975 through and including May 16, 1975. Under this theory, the services rendered prior to May 16, 1975 for which no payment had been received would be protected by Appellant's charging lien, the applicability of which, at least as to fees for services rendered prior to May 16, 1976, was not disputed by any party.

However, despite his own April 2, 1976 ruling and the ultimate absence of any objection by any party represented at the hearing held on that date, Judge Galgay denied the application as set forth in his memorandum decision of May 13, 1976. By so doing, Appellant respectfully submits that Judge Galgay erred, not only substantively, but also because he contradicted his earlier ruling, which ruling was in accordance with the expressed views of the parties represented at the hearing. Such agreement among the parties was tantamount to a stipulated resolution in favor of granting Appellant's application in full.

POINT II

THE RULING BELOW CANNOT BE SUSTAINED
UNDER THE THEORY OF ECONOMY IN THE
ADMINISTRATION OF BANKRUPTCY CASES.

There is no support in the record for the implicit conclusion of the Bankruptcy Court's decision that granting the application in the amount requested would violate the principle of economy in the administration of bankruptcy cases. In fact, the amount of the fees applied for was less than the prevailing charges of special counsel:

" Moreover, the rate charged by [Herbert Robinson] in the aforesaid application was computed on the basis of \$25.00 an hour less than [Herbert Robinson's] prevailing charges during that year." (A.80).

Since Mr. Robinson contributed 115.45 hours of work on this matter, the amount for which Appellant applied was at least \$2,886.25 less than its prevailing time charges.

The principle of economy in the administration of bankruptcy cases cannot justify an erroneous finding which is not supported by the record. Appellant does not dispute the principle of economy, but that principle does not justify a reduction of Appellant's fee where that fee is a fair and reasonable one and substantial benefits were secured by reason of Appellant's services.

"We think that the economical spirit of the Bankruptcy Act does not require, nor justify, reducing a requested fee where, as

here, by all other proper standards, it is a fair and reasonable one.... Under such circumstances we find the requirement of economy has been met and that the reduction is unsupported either by the law or the evidence." Jacobowitz v. Double Seven Corporation, 378 F.2d 405, 408-09 (9th Cir. 1967).

Accord: In re Brooks & Woodington, Inc., 505 F.2d 794, 799 (7th Cir. 1974).

As stated by Judge Asa S. Herzog in his article entitled "Fees and Allowances in Bankruptcy", 36 Conn. Bar Journal 374 (1962):

"But if economy is one side of the coin, then fairness is surely the other side, for the workman is worthy of his meat [citing Matthew X:10] and skilled attorneys are entitled to the fair value of their services." Id. at 377-78.

Here the Bankruptcy Court reduced Appellant's fees approximately 30% although it recognized the benefits from the services counsel rendered Grant to be \$230,000. This tremendous reduction imposes substantial injustice upon counsel. This is particularly true where, as stated supra, the amount of the fees applied for was less than the prevailing charges of counsel.

CONCLUSION

For all the foregoing reasons, Appellant, respectfully requests that this Court reverse that portion of the order of the Bankruptcy Court entered in this proceeding on May 13, 1976 which denied Appellant's motion for an order permitting it to transfer to itself the sum of \$37,361.25 and which granted Appellant's motion only to the extent of permitting Appellant to transfer to itself the sum of \$26,671.70, and the orders of the District Court dated October 12, 1976 and November 29, 1976 which dismissed Appellant's appeal from that order and upheld that dismissal upon reargument, and upon such reversal, grant Appellant's application in full together with such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

LIEBMAN, EULAU, ROBINSON & PERLMAN
Appellant Pro Se
Office and P. O. Address
32 East 57th Street
New York, New York 10022
(212) 355-5522

Of Counsel:

Herbert Robinson
Allan J. Kirschner
Ted M. Rosen

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RUIZ, being duly sworn, deposes and says that deponent is a party to the action, is over 21 years of age and resides at Bergen County, New Jersey.

That on the 18th day of February, 1977, deponent served the within appellant's brief and joint appendix upon the following attorneys at their respective addresses:

Wachtell, Lipton, Rosen & Katz, Esqs.
Attorneys for Debtor-in-Possession
299 Park Avenue
New York, New York 10017

Ballon, Stoll & Itzler, Esqs.
(Co-Counsel to Creditor's Committee
prior to Adjudication)
1180 Avenue of the Americas
New York, New York 10036

Securities & Exchange Commission
26 Federal Plaza
New York, New York 10010

Popper & Popper, Esqs.
Co-Counsel to Secured Supplier's Committee
200 Fifth Avenue
New York, New York 10010

Hahn, Hessen, Margolis & Ryan, Esqs.
Co-Counsel to Secured Supplier's Committee
350 Fifth Avenue
New York, New York 10001

Debevoise Plimpton, Lyons & Gates, Esqs.
Counsel to Schroeder Trust Co.
299 Park Avenue
New York, New York 10017

Deponent deposited a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Irene Ruiz
Irene Ruiz

Sworn to before me this 18th
day of February, 1977.

Elizabeth T. Sawyer
Notary Public

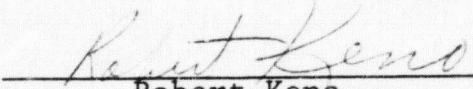
ELIZABETH T. SAWYER
Notary Public, State of New York
No. 31-4606635
Qualified in New York County
Commission Expires March 30, 1977

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

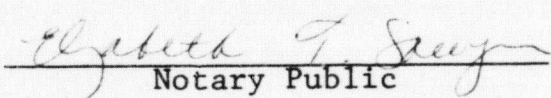
ROBERT KENO, being duly sworn deposes and says:

1. I am not a party to this action, am over 21 years old and reside in the City and State of New York.

2. On the 18th day of February, 1977 I served the within appellant's brief and joint appendix upon Weil, Gotshal and Manges, Esqs., Counsel for the Creditors Committee, by delivering true copies thereof to their offices located at 767 Fifth Avenue, New York, New York 10022.


Robert Keno

Sworn to before me this 18th
day of February, 1977.


Notary Public

ELIZABETH T. SAWYER
Notary Public, State of New York
No. 31-4606635
Qualified in New York County
Commission Expires March 30, 1977